IN ARBITRATION

In the Matter of the Arbitration Between:
SOUTHWEST AIRLINES COMPANY

and

Grievance of:
[redacted]

Termination, Violation of SOE
Case OAK-R-1919/21

TRANSPORT WORKERS UNION LOCAL 555

Before M. David Vaughn,
Panel Arbitrator

OPINION AND AWARD

This proceeding takes place pursuant to Article 20 of the collective bargaining agreement (the "Agreement") in effect at times relevant between Southwest Airlines Company ("SWA," the "Employer" or the "Company") and the Transport Workers Union of America Local 555 ("TWU" or the "Union") (the Company and the Union are the "Parties" to the proceeding) to resolve a grievance which protests the Company's dismissal of Ramp Agent [redacted] ("Grievant") for failure to comply with the terms of a State of Operational Emergency ("SOE") Declaration which required, in part, that employees who call out sick during a designated emergency produce a doctor's note from an in-person visit documenting their illness on their first work day they return to work.

The Parties were unable to resolve the dispute through the steps of the negotiated grievance procedure, and the Union invoked arbitration. From a panel of arbitrators maintained by the Parties, I was designated to hear and decide the dispute.

A hearing was convened in Dallas, Texas, on December 20, 2021 at which the Company was represented by Attorney Jonathan G. Rector of the law firm of Littler Mendelson, P.C. and the Union by Grievance Specialist Brian Smith. A court reporter was present at the hearing; by agreement of the Parties, her verbatim transcript (page references to which are designated as "Tr. __") constitutes the official record.

The Parties stipulated that the grievance is arbitrable and properly before me. They were then each afforded full opportunity

to present witnesses and documents and to cross-examine witnesses and challenge documents offered by the other. At the call of the Company testified Senior Manager of Labor Relations Robert Watkins and Oakland Station Services Manager Ana Negrao. For the Union testified Grievant Specialist Brian Smith and Grievant, who was present throughout the hearing. Witnesses were sworn but not sequestered. Although the hearing was held in person, Ms. Negrao and Grievant testified remotely on Zoom. Joint Exhibits 1, 2A, 2B and 3 ("J. Exh. "), Company Exhibits 1-17 ("Co. Exh. __") (less Co. Exhs. 4 and 10) and Union Exhibits 1-3 ("U. Exh. __") were offered and received into the record. At the conclusion of the hearing, the evidentiary record was complete.

The Parties elected to close by written post-hearing briefs ("PHB"), the last of which was received on February 9, 2022, whereupon the record of proceeding closed.

I find the matter to be properly before me, ready for decision. This Opinion and Award is based on the record and consideration of the arguments of the Parties. It interprets and applies the Agreement.

ISSUES FOR DETERMINATION

The issues for determination are:

Did the Company terminate Grievant for just cause? If not, what shall be the remedy?

RELEVANT CONTRACTUAL PROVISIONS

Article 1, (Purpose of Agreement) provides:

> A. The purpose of this Agreement is, in the mutual interest of the Company, the Union, and the Employees, to provide for the operation of the Company under methods which shall further, to the fullest extent possible, the well - being of Southwest's Customers, the efficiency

> of operations, and the continuation of employment under reasonable working conditions. It is recognized to be the duty of the Company, the Union, and the employees to cooperate fully to attain these purposes.

Article 2 (Scope of Agreement) of the Agreement (J. Ex. 1), provides, in relevant parts:

> C. Reasonable Work Rules. Employees covered by this Agreement shall be governed by all reasonable Company rules and regulations previously or hereafter issued by proper authority of the Company which are not in conflict with the terms and conditions of this Agreement and which have been made available to covered Employees and the Union Office prior to becoming effective.
>
> 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 20 (Grievance/System Board/Arbitration Discharge and Discipline), Section One (Procedures) of the Agreement, provides, in relevant parts:

> 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.
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> * * *
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> L. Interpretation/Application of Agreement. . . .
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> 15. 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 23 (Attendance) provides, in part:

A. Purpose. ...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.

FACTUAL BACKGROUND

The Company is one of the largest and most successful U.S. airlines and employs more than 55,000 people. The Union represents a bargaining unit of Company employees including Ramp Agents. At all times relevant to the instant grievance, Grievant was employed by the Company as a Ramp Agent, was a member of the bargaining unit and was covered by the Agreement.

The Company operates in an extremely competitive environment. Its success is attributable in part to its commitment to customers to provide reliable, on-time service. Article 1 of the Agreement specifically recognizes the commitment of the Company and Union to the well being of customers, the efficiency of its operations and the continuation of continued employment of employees under reasonable working conditions. Jt. Exh. 1. Committed employees play an important part in delivering the Company's services and promoting its efficiency.

Covid has created enormous strains on Company operations, including those resulting from decreased numbers of available employees. Employees have themselves suffered illness resulting

from exposure to Covid; and employees have been restricted and are cautious to avoid exposure to the virus.

Ramp Agents

Ramp Agents get planes to the ramps, handle the movement and loading of passenger baggage from the terminal to the plane for departing flights, from the plane to the terminal to baggage claim for arriving flights and movement between planes for passengers making connections. Ramp Agents also perform various plane-related service functions, including, by way of example, replenishing water and servicing lavatories. Tr. 55.

The functions Ramp Agents perform are vital to smooth and timely Company operations. If bags do not get loaded on time, for example, the flight will not depart on time. Flights which are not on time cause ripple effects throughout the Company's system and undermine the efficiency of its operations. Significant disruptions can be created by the failure of the Ramp Agent work group to carry out their assignments in a timely manner. Tr. 57. That cannot happen if too few Ramp Agents are working; and Ramp Agent absences require those who do work to work harder and longer and to carry more of the burden.

Relevant Company Rules

The Company has issued a Ground Operations Employee Handbook ("Employee Handbook") (Co. Exh. 9), which contains Basic Principles of Conduct which, at Section 3.2, require employees to "adhere to all Company policies and procedures" and states that, if any of the 42 principles is violated, it may be grounds for disciplinary action, "depending on the particular violation and the circumstances." Prohibitions and cautions in the Basic Principles of Conduct include:

4. Complete coordination with Coworkers and Supervisors is required to provide harmonious working conditions.

15. Insubordinate conduct or refusing to follow a work order or any act of insubordination

17. Falsification of any Company records including, but not limited, your . . . claim for sick leave or sick pay . . . .

It is undisputed that Grievant received the Employee Handbook and Manual and was familiar with their requirements.

States of Operational Emergency

The Company makes declarations of states of operational emergency ("SOEs") at such times as Management determines that a Station's unanticipated absences in one or more specific work groups have reached a point where Company operations - most directly, the timely departure of flights - are in jeopardy. Tr. 30. As indicated, Southwest's point-to-point network means that a delay at a particular station may create extended, system-wide delays.

The Company asserts that the purpose of the Agreement (Article 1) and the Management Rights Provision of the Agreement (Article 2) allow it to issue SOE declarations. Its witnesses testified that SOEs are only issued as a last resort, are accompanied by other actions intended to increase the number of employees coming to work and are intended to be of short duration, from as short as a few hours to two days. Tr. 33. The Company's right to issue such declarations has been upheld in arbitration. Tr. 35, *SWA/TWU Local 555*, Case No. TWU-ALL-5001/142339 (Lemons 2014) and cases cited therein ("*Lemons Award*").

The Company requires notes based on in-person doctor visits in order to provide "a higher level of illness verification" allowing a provider "to check a patient's vitals and conduct an in-person evaluation to ensure that a reported visit is legitimate." Tr. 51. Mr. Watkins testified that, during the time of the SOE at issue in August of 2021, "more health care facilities are transitioning back

to in-person medicine and it is therefore not a significant barrier to illness verification". Tr. 52, PHB pp4-5.

Grievant's Work History

Grievant was employed by the Company as a Baggage Handler and was assigned to Oakland (also "OAK"). She had approximately three years of service. Grievant had prior attendance issues (Co. Exh. 6), but no active discipline at the time of the incident at issue. Her performance had been otherwise satisfactory.

Oakland Station

Oakland ("OAK") is a high connectivity station, with many originating passengers connecting to other cities. Flight delays due to Ramp Agent shortages would have ripple effects throughout the Company's system.

Declaration of State of Emergency for Oakland Ramp Agent Work Group

By the morning of August 22, 2021, 25 Ramp Agents scheduled to work at OAK, representing at least 200 work hours; had called off sick or were absent for personal reasons, jeopardizing the ability of the Station to meet its baggage processing and other obligations.

OAK Station Management determined to issue an SOE with respect to employee shortages in the Ramp Agent work group. Based on the personnel shortage resulting from the number of absences, the Company's Vice-President of Ground Operations declared an SOE at 0830 that day. Tr. 35; Co. Exh. 1. The SOE sought to reduce the number of employees calling off sick by 'direct[ing] employees alleging illness to provide a doctor's note on the first day returned to work indicating when the doctor was seen and confirming that the Employee was unable to work on the dates he claimed illness." It warned that "[f]ailure to comply will be considered

insubordination and abuse of sick leave which will result in your termination." Co. Exh. 1. The SOE remained in effect until August 25, 2021.

Mr. Watkins testified that the purpose of the in-person appointment requirement is to allow the provider "to check an individual's vital signs and conduct an in-person evaluation to ensure that a reported illness is legitimate". Tr. 51, Co. PHB at 5. He testified that, at the time the OAK SOE was issued, in August of 2021, that the requirement for in-person visits was not a significant barrier to illness verification because health care facilities were transitioning back to in person medicine. Tr. 52. Mr. Watkins conceded, however, that telemedicine appointments are typically accepted by the Company. Tr. 46. Grievant testified that she could not get an earlier appointment than the one she got (Tr. 119) and denied the availability of in-person appointments. Id.

The Company verbally notified the Union as to issuance of the SOE. Employees were sent notice of the SOE by email. Grievant received the email notice. Co. Exh. 3. The SOE was also posted at every time clock at OAK, including the clock at which Grievant punched out. Tr. 64-65.

Any employees who called in sick of the SOE were informed by the supervisors of the SOE, including the requirements of a doctors slip from an in-person appointment and the penalty of termination for non-compliance.

Grievant's Schedule

Grievant was working on August 22nd, having punched in at 4:59 a.m. Tr. 63, Co. Exh. 5. She was sent the SOE by email and passed it at the time clock as she clocked out at 1:28 p.m. Tr. 65. On August 23, 2021, Grievant was scheduled for a mandatory overtime shift, but she called off work sick. She spoke to a supervisor, who had been instructed to inform all Ramp Agents of the SOE the requirements, including the in person appointment, the requirement

to bring the required note the first day of return to work and the disciplinary consequence of failure to comply with the requirements. The Company's call log indicates that she was so advised.

The Union challenges whether she received the full instruction and warning, but between Grievant's obligation to be aware of Company policies, the email, the time clock notice and the likely supervisor's instruction, I hold her to have been on notice of the SOE requirements, including the disciplinary consequences. Indeed, she acknowledged as much. Tr. 64-68, 113.

Grievant's Absence

Grievant was off work on August 23 and 24. She returned to work on August 25th. Tr. 70, Co. Exh. 6. She did not bring in a doctor's note, acknowledged that she did not do so and gave no reason or excuse. Tr. 71., Co. Exh. 6. The Company thereupon suspended Grievant and issued her a notice to attend a fact-finding hearing. Jt. Exh. 2B, p.15.

The pre-disciplinary fact-finding meeting was held on September 1, 2021. Jt. Exh. 2B, P. 14. At that meeting, Grievant did not bring a doctors note. She did not explain what she had done to comply with the SOE, why she failed to bring a note, whether she had seen a doctor or been unable to obtain an appointment or whether she had a later appointment. Tr. 71. However, Grievant showed Ms. Negrao a phone screenshot from her cellphone of a doctors note indicating that she had a telemedicine appointment on August 30, 2021. Co. Exh. 7. U. Exh. 3. That appointment was five days after her call-off.

The record does not indicate that Grievant or the Union provided the Company with either an electronic or hard copy of the note or that the Company asked for such a copy, but the Company clearly saw the note, as evident in its exhibit. SWA does not, in any event, challenge the sufficiency of the contents of the note to

establish Grievant's medical inability to work on the days she was absent other than that it was not based on an in-person doctors visit.

In the fact-finding meeting, Grievant stated that, because of Covid restrictions and her doctor's limited availability, she could only get a telemedicine appointment and could not get such an appointment until August 30th. Tr. 72. She did not say when she had initiated the request for the appointment, but acknowledged that she only made one call and only to the doctor she regarded as her primary care provider. Tr.73-75. The Union asserts that she indicated willingness to see any doctor ("she got an appointment as soon as one was available with the first physician available..." Un. PHB at 7,8).

Grievant conceded that she was aware of the SOE and acknowledged notice that employees could be terminated for failure to comply. Tr. 75.

In the arbitration hearing, the Union presented evidence that an emergency room or urgent care center visit would have resulted in unreimbursed medical costs and that Grievant was concerned that such a visit would have unnecessarily exposed her to Covid. Tr. 112-113.

The Employer challenged Grievant's assertions that she only saw her primary care provider: she was unable to spell, or even remember, the name; but she testified that she had elected him as her assigned doctor. Tr. 124. The Company introduced evidence that Grievant had, in fact, made appointments and been seen by a variety of other Kaiser doctors at other facilities, both in person and remotely, over the two previous years. Tr. 122, 124-127, Co. Exhs. 12-17.

Following the fact-finding hearing, the Company terminated Grievant's employment for failure to comply with the SOE requirements, which it considered insubordination and abuse of sick

leave. Co. Exh. 1. The Union challenged the termination on the basis that it was wrongful, unfair and unjust and requested reinstatement and a make-whole remedy. Id. At p.12. The case deadlocked at the SBA. Id. at p.4. The Parties were unable to resolve the dispute through their further efforts; and the Union invoked arbitration. This proceeding followed.

POSITIONS OF THE PARTIES

The positions of the Parties were set forth at the hearing and in their post-hearing briefs. They are summarized as follows:

The Company argues that it proved Grievant to have been guilty of misconduct - by violating the terms of the Declaration of Operational Emergency - and that the penalty of termination was reasonable under the circumstances presented, including the specific condition included in the SOE that violations would result in termination. It asserts that the evidence is sufficient to establish just cause to terminate Grievant. SWA contends that the penalty was not arbitrary or unreasonable - the contractual standard for review - and was not, therefore, contractually appropriate to be modified or overturned.

SWA points out that the Agreement requires employees to be aware of and comply with all reasonable Company rules as issued and available to employees which are not in conflict with the Agreement. Citing the *Lemons Award*, it maintains that the Company's right to issue SOEs has been established in prior arbitrations and by courts.

SWA argues that the evidence establishes that operational disruptions resulting from unanticipated absences have a severe negative impact on the Company's brand, reputation, customers and other employees and expose it to regulatory fines and penalties. It asserts that the heightened sickness verification during an SOE is reasonable and that inability to enforce the emergency work rules

would effectively render the SOE without consequence and therefore insufficient to guarantee sufficient staffing for operations.

The Company contends that the evidence establishes that Grievant was aware of the SOE at the time she called off sick and of the consequence - termination - of violating the illness verification requirement. It points out that Grievant had not seen a doctor in person at the time she returned to work on August 25th and, perforce, did not have or provide the required note. SWA also points out that she gave no explanation of her status with respect to her appointment status at that time or any later time, including the fact-finding meeting.

SWA argues that its determination to terminate Grievant was reasonable and should withstand arbitral review. It points out that Grievant's explanations for having failed to comply with the SOE (preferred doctor only available two days per week and that she took the first available appointment) and having failed to make any effort to be seen at an urgent care center or emergency room, were insufficient to excuse or mitigate the penalty imposed. The Company maintains that Grievant simply determined not to comply, or seek to comply, with the SOE requirements, thereby warranting her termination.

The Company contends that the Union's argument that the requirement for an in-person (rather then online) doctor visit was unreasonable is, itself, inappropriate. It points out that this is a disciplinary, rather than contractual, grievance; and it urges that a challenge to the Company's system-wide policy is, therefore, improper. SWA contends that I should decline the Union's backdoor effort to convert this into a policy grievance.

SWA also rejects the Union's argument that Grievant did all that she could reasonably be expected to do, in that she called her doctor and took the doctor's first available appointment. It asserts that there is no indication that Grievant scheduled her appointment prior to August 30, 2021; and the Company contends that

the evidence contravenes her commitment to her doctor, since she could not even recall the doctor's name and since she had seen a number of different doctors at different locations - including in person - over the previous two years. The Company contends that Grievant made no effort to see alternative doctors or utilize other facilities, even though she knew the requirements to keep her job.

The Employer asserts that its decision to terminate Grievant was not arbitrary or unreasonable and that there is, therefore, no basis for disturbing its decision. The Company avers that it met its burden to prove Grievant's termination to have been for just cause and urges that the grievance be denied.

The Union argues that the Company terminated Grievant for reasons which are arbitrary and unreasonable, and therefore without just cause. It asserts that Southwest's rule that employees will be terminated for failure to furnish a doctors note is inconsistent with the requirement of the Agreement, which provides the penalty for such failure as assessment of a "Point".

TWU also protests that the heightened requirement that a note be based on an in-person visit is arbitrary, since the level of treatment and verification is no different from a telemedicine visit. It points out that Grievant's health provider instructs patients not to visit without an appointment and states that "clinicians will determine if you need an in-person appointment". It argues that such determinations are for health providers, not the Company.

The Union also argues that the Company's assertion that Grievant could have gone to an urgent care facility or an emergency room for examination if she was unable to obtain a timely in-person appointment is ridiculous, careless, reckless and dangerous. It urges that the extra, unreimbursed cost, time and risk of exposure during the pandemic militate against such a requirement.

TWU maintains that Grievant did what she was asked to do, getting an appointment as soon as she could with the first physician available, and provided documentation as soon as she could. It urges that discipline for violation of the SOE is, therefore, inappropriate.

As to Grievant's claimed insubordination, the Union argues that being given an order is a necessary prerequisite to the offense. It contends that Grievant was not given a direct order to see a doctor in person and bring in the slip on her first day back. It maintains that Grievant took all reasonable steps to comply with the reasonable aspects of the Company's policy and that the Company's termination action was arbitrary and unreasonable.

For all of these reasons, TWU maintains that the Company lacked just cause for Grievant's termination It urges that I sustain the grievance, rescind Grievant's termination, reinstate to employment and make her whole for wages and benefits lost.

DISCUSSION AND ANALYSIS

This is a discipline case. The grievance protests the Company's action terminating Grievant as being without just cause. The burden of proving just cause for Grievant's termination rests with the Company.

The scope of the grievance does not include, and the evidentiary record does not support, a challenge to the Company's general right to promulgate and enforce SOEs. Indeed, prior arbitration awards have upheld the Company's right in this regard. *See* the *Lemons Award*, discussed, below. The Union does not in this proceeding directly challenge the Company's authority to issue SOEs; however, it makes both general assertions of the unreasonableness of the SOE and more specific objections to its requirements that employees provide on their first day back a doctor's note from an in-person visit. To the extent that the Union's assertion as to the unreasonableness of the SOE constitutes

a challenge to the Company's right to issue SOEs or to the general validity of specific terms, that is beyond the scope of the grievance and the just cause issue before me and beyond my jurisdiction.

I credit the Company's evidence that unscheduled employee absences at OAK created a situation in the Ramp Agent work group which seriously threatened the ability of the Company to operate its flights on schedule, thereby constituting an operational emergency and warranting imposition of an SOE. I likewise accept, for purposes of this analysis, that the SOE schedule restrictions placed on employees to be available, to document their medical absences and to be subject to termination for violations of the SOE were not unreasonable.

Thus, examination of the SOE in this case is limited to whether the Company proved just cause to discipline Grievant and, if so, whether termination was a reasonable penalty. The questions are whether the SOE was applied properly to Grievant; whether, as properly applied, she met her obligations under it. If she did not, whether discipline and the penalty of termination were reasonable and appropriate consequences. For the reasons which follow, I am persuaded that the Company failed to meet its burdens and sustain the grievance.

The Agreement

Article 1 of the Agreement provides that its purpose is to provide for the operation of the Company under methods which, to the fullest extent possible, promote the well-being of Southwest's Customers, the efficiency of operations, and the continuation of employment under reasonable working conditions. It is the contractually-recognized duty of the Company, the Union, and the employees to cooperate fully to attain these purposes. The Agreement, and the assessment of methods promulgated by the Company, must be interpreted and applied consistent with those agreed purposes.

Article 2 of the Agreement provides, in part, that employees are governed by all reasonable Company rules and regulations which are not in conflict with the Agreement and which have been properly promulgated.[1] Management rights to direct the work force are subject to the provisions of this Agreement, but work rules and policies not inconsistent with the terms of the Agreement cannot stand.

The Union argues that the SOE is not reasonable (pointing in particular to the requirement that employees submit doctor notes based on in-person visits) and that it is not consistent with the terms of the Agreement (pointing to the procedures and consequences of absences not supported by medical documentation found in Article 23, Section One). I am not persuaded that the disciplinary consequences described in the SOE are inconsistent with the procedure under normal conditions.

As indicated, this is not a grievance or record appropriate to determine the authority of the Company to issue SOEs or even to challenge the validity of the SOE at issue, but only to the question whether the requirements of the SOE were properly applied to Grievant.

The Company's notice to employees that a failure to comply with the enhanced doctors note requirement would be considered insubordination and would result in termination served as notification as to the Company's expectations and the importance it attaches to the SOE. However, such notice does not, itself, constitute proof of just cause for the discipline, nor does the notice establish the appropriateness of the penalty of termination.

[1]Nothing herein restricts the Company from taking action in emergency situations as it deems necessary. However, if, in doing so, it violates the Agreement, it may be liable for the consequences.

Assessment of Facts

I find the essential facts to be as follows: there was an operational emergency with respect to the Ramp Agent work group at OAK on August 22, 2021, in response to which the Company issued an SOE. The SOE was necessary, reasonable and within the Company's authority. It was duly and properly promulgated.

I find that Grievant was made aware of the issuance of the SOE and was advised of its terms, pursuant to which she was obligated to present on her return to work a doctors note from an in-person appointment confirming that she was unable to work on the dates she was absent. I am convinced that she was advised and understood that failure to comply with its terms would result in her termination.

I also find that Grievant failed to comply with the SOE: she did not bring the required note with her on return to work on August 25, 2021 and gave no explanation why she had not done so. The Company thereupon properly suspended Grievant with pay and scheduled her for a fact-finding meeting.

I find in addition, that, at the fact-finding meeting, Grievant did present a doctors note from an online appointment conducted with Kaiser - her health provider - on August 30th, five days after she returned to work. It cannot be determined when Grievant called to make the appointment.

The Company asserted that Grievant refused to see any doctor other than her own (Tr. 15), that she made only a single call and took that doctor's earliest appointment from his limited days of availability. It contends that a single call did not produce the required result and did not satisfy her obligation.

I am persuaded that the Company's characterization of Grievant's statements about her doctor are misdirected: she acknowledged that she could not recall the name of her primary doctor and had, in fact, been seen by a variety of other Kaiser

doctors at a variety of locations, both in person and on line, during the two years preceding August 30th.

However, the evidence is that Kaiser was her health provider, that Kaiser has a single point of entry and that, by making that single call, she opened access to the entire system: all doctors at all locations. She testified that she indicated to Kaiser willingness to see any doctor at their first available appointment: "they gave me the as soon as possible appointment." Tr. 111-119.

Grievant did not make any effort to go to an urgent care center or an emergency room to be seen. Grievant testified (Tr. 112-113) and the Union argues that diagnosis and treatment at such locations would have been inconvenient, time-consuming, unsafe (because of Covid) and expensive (as Kaiser would not have picked up any or most of the cost).

As to the added burden of requiring in-person visits, I find Mr. Watkins' testimony that things were opening up in August of 2021 and that doctors were returning to in-person appointments to be conclusory, unsupported and contrary to what was going on at that time.

Just Cause Analysis

The SOE requires employees to submit doctors notes from an in-person visit at the time of their return to work, certifying their medical unavailability to work the days during the SOE on which they were absent. Grievant failed to submit the note timely - not until the day of the fact-finding hearing - and the note was based on a telemedicine appointment. The Company asserts that Grievant's violations warranted discipline and the penalty of termination.

Through the SOE, the Company unilaterally announced that a first violation of the SOE requires termination. The SOE characterizes violations of its terms as insubordination and sick leave abuse. The offenses charged require separate analysis.

Insubordination

The Company characterizes Grievant's failures to comply with the direction of the SOE as insubordination, which is, of course, a serious - and frequently terminable - offense. But insubordination - willful failure to comply with a proper instruction - includes a broad range of conduct and circumstances. The evidence is clear that the SOE provided Grievant instructions.

The nature of Grievant's response is described above. The evidence is that she made an attempt to comply with the Company's instruction. She did not refuse or defy. She made an attempt to comply and partially did so.

The evidence persuades me that, in Grievant's specific situation and timing, parts of the Company's instruction (the in-person appointment requirement) - and parts of its expectations (the idea that she should have gone to an emergency room to obtain the appointment) were beyond reasonable expectations. The requirement that she provides the note immediately on her return to work assumes her ability to get an appointment on two days or less lead time. I am persuaded that Grievant did not control the availability of Kaiser appointments or whether Kaiser would schedule the appointment in-person or online, but did what she could and obtained the first available slot.

Moreover, while an in-person visit might - or might not - provide a higher level of verification than an online visit, it is not shown to have been such in the instant situation. Such decision is, in any event, a medical determination. Kaiser - not Grievant - made the call whether to schedule an in-person or telemedicine appointment. The Company's substitution of its judgment as to the need for an in-person appointment to obtain a higher of verification would substitute labor relations criteria for medical assessment.

I am persuaded that Grievant, operating within the Kaiser guidelines and in August of 2021, made reasonable efforts to comply with SOE requirements but could not do so for reasons both practical and beyond her control. I am not convinced that she is guilty of failure to comply with the reasonable parts of the Company's SOE instructions as applied to her. Grievant's failure to comply with those parts of the instructions does not warrant discipline for insubordination.

Abuse of Sick Leave

As to the charge of abuse of sick leave, Article 23, Section One defines sick leave abuse as "using sick leave or sick pay for a purpose other than intended". There is no proof Grievant did that.

The Company's determination to require employees to provide higher levels of verification may or may not be accomplished by an in-person visit requirement, depending on the nature of the illness. As indicated, the determination whether to require such a visit is a medical determination. *See*, in this regard, Kaiser's statement in U. Exh. 2: "[o]ur clinicians will determine if you need an in-person appointment". I am not convinced that Grievant could have overridden Kaiser's determination to provide an online (rather than in-person) appointment or to have obtained an earlier appointment.

The Company asserted and presented testimony that obtaining an in-person appointment was no burden. I am not convinced. In addition to the evidence of Kaiser's system of triaging appointments, the Company's testimony was conclusory and unsupported. Given complications from the pandemic still in effect at the time, getting an in-person appointment in the time period of a short absence could have been difficult or impossible. In August of 2021, things were not "back to normal" or returning there.

I am not persuaded that Grievant's handling of her sick leave constituted sick leave abuse under either the contractual definition or under any special definition established by the SOE.

Required Use of Emergency Room or Urgent Care

The alternatives proposed by the Company of having employees go to an urgent care center or to a hospital emergency are, as the Union argues, burdensome, time-consuming, potentially unsafe and expensive, going well beyond what the Company's health insurance benefits - or other health benefits - cover.

I am persuaded by Grievant's statements and the Union's arguments that requiring her to venture out to an emergency room or urgent care center in August of 2021, in the midst of the pandemic, was not reasonable and reject it as a required option. I do not find that Grievant's failure to utilize that Company-claimed option to be a separate basis to warrant discipline.

Premises of the SOE

The promise of termination must be understood as a threat for employees who fail to show up for work, even if they are borderline sick. Indeed, by setting the procedural requirements high and rigid, the SOE incentivizes employees to come to work even if they are sick, in order to avoid the time, hassle and possible cost of getting an in person appointment and obtaining a note prior to the time they come back to work.

The Company's requirement to not accept doctors notes except those based on in-person appointments purports to be based on a higher level of verification than is available from telemedicine diagnoses and prognoses. As indicated, the existence of such requirements acts as a strong disincentive for employees to stay off work, sick or well. However, the record contains no actual medical justification for the higher standard. There is no evidence

that in person appointments provide any higher level of medical certainty as to illness status than a telemedicine appointment.

In-person review of vital signs and other examination may or may not be higher efficacy; the determination whether an in-person appointment (rather than a telemedicine appointment) is a *medical* determination, not an LR determination. Indeed, as indicated, Kaiser - through whom Grievant receives her health care - specifically states that it - not a third party - makes the determination whether an in person hearing is medically required. That is not a call for the Company or the Grievant seeking to implement the Company SOE to make. I note, in this regard, that there is no evidence that the Company rejects doctors notes based on telemedicine appointments in other contexts.

In the instant case, there is no indication that Kaiser believed that an in-person doctors appointment was medically appropriate: it wrote Grievant a note (unchallenged in its content by the Company) based on a telemedicine appointment, rather than referring her for in-person examination, diagnosis and treatment.

The Doctors Note

To justify Grievant's time off sick during a SOE, the Company was entitled to a note that established her actual illness, a diagnosis and a prognosis that supported her absence from work. Indeed, such requirements are set forth in other contexts. See Article 23, Section One of the Agreement. However, the Company does not in this case challenge Grievant's doctors note (as presented on her cell phone) to support her absence as being deficient in any of the required elements. Indeed, it is not clear that an in-person appointment would have provided any higher level of verification as to Grievant's condition, diagnosis, treatment or prognosis.

The Company argues that the SOE should be upheld and applied strictly in accordance with its terms, based on previous, precedential Awards and Federal Court approval. Co. PHB at 10. As

indicated, I have found that the Company's right to issue and enforce a SOE is well within the scope of its Article 2 authority.

That finding is, indeed, supported by prior Awards cited by the Company issued by Arbitrator Lemons (*SWA and TWU Local 555*, Group Grievance, Case No. TWU-AAA-5001/14 (2014)). He cites and quotes from other Awards (not separately provided except for Hill I and II, below) by Arbitrators Helburn (*SWA and TWU Local 556*, Grievance Nos. 1139 and 1154 (1998), Hill (Two Awards: *SWA and TWU Local 555*, Subcontracting, Case No. MCO-R-0885-11 (2011) ("Hill I") and *SWA and TWU Local 555*, Group Grievance, Article 17(I) (2012) "("Hill II") and Vernon (SWA and Teamsters Local 19, Attendance Issues (2014)) as well as Arbitrator Lemons' own prior Award *(SWA and TWU Local 555*, TWU-ALL-5001-13 (2014). Arbitrator Lemons references Awards by Arbitrator Neumeier and another by Arbitrator Vernon, but found them inapposite and did not describe the cases in sufficient detail to assess their applicability to the instant case.

I have previously found that the Company reasonably concluded on August 22, 2021 that it was facing an operational emergency in the Ramp Agent work Group at OAK and that its issuance of a short-term, work group specific SOE was well within the scope of its right.

The Company's issuance is not only supported by the authorization to issue reasonable work rules by the specific acknowledgment by the Union in Article 1 of the Agreement of its duty to further "to the fullest extent possible, the well-being of Southwest's customers, the efficiency of operations and the continuation of employment under reasonable working conditions." The SOE was clearly intended to correct a situation contrary to the well-being of the Company's customers and to improve the efficiency of its operations.

That said, it is necessary not to oversell the application of prior awards and orders of the Federal Courts. The other

arbitrators whose cases are cited by Arbitrator Lemons and by Lemons himself appear to have been faced with possible group work stoppages, illegal under both the Agreement and the Railway Labor Act. That is not asserted, let alone proven, in the instant case.

Moreover, while the Federal Judges hearing the Union's request to set aside an earlier SOE (as quoted by Arbitrator Lemons, although not fully cited) appeared in *dicta* to endorse the Company's use of SOE powers, it appears that the Judges actually disposed of the issues before them by finding that the lawsuit presented a "minor dispute" under the Railway Labor Act and, therefore, that the validity of the SOE and discipline administered thereunder was appropriate for and referred to arbitration. The chosen arbitrator - not the Judges - thus had the task of deciding the merits of the dispute.

As indicated, the grievance at issue is not an appropriate vehicle to challenge the validity of the SOE, even if it was not otherwise upheld. *See* analysis, above. The question before me is limited to whether the Company had just cause for Grievant's termination and, if not, what shall be the remedy. That includes analysis of all of the facts and circumstances surrounding the discipline, not simply the authority of the Company to determine an operational emergency and issue the SOE.

In this regard, the prior Awards cited by the Company are not dispositive of several of the issues relevant to the just cause analysis of Grievant's discipline: all of the Awards cited and described in the Appendix to the Company's PHB took place long prior to the Pandemic, and so the SOE-specific requirement in those cases that doctors notes to cover SOE sick leave be based on in-person appointments did not trigger questions of covid exposure from such appointments, timely and reasonable availability of in-person appointments, the differential efficacy of in-person versus telemedicine appointments and/or the possible necessity to resort to emergency rooms or urgent care centers to obtain such in-person

appointments. Consideration of those and other factors is required and has been conducted as part of the just cause analysis.

I note that Arbitrator Vernon (as quoted by Arbitrator Lemons) stated 'They [the Union] suggest that if an employee is directed to get a doctor certificate it will require an exam. The Arbitrator takes notice that this is not necessarily so given that doctor notes are obtainable without examinations and sometimes just on verbal request to a physician's support staff. This is true even more so recently with the advent of e-Medicine." *Lemons 2014 Award* at 14. The latter reference appears to be to what is now more popularly called "telemedicine".

Thus, the precedent cited by the Company does no more than to establish the Company's rights which have already been found, but does not control or even reach the issues on which this just cause dispute turns.

Need for Effective SOE

The Company is entitled to compliance with its SOE. The special documentation requirements and automatic penalty are designed to maximize compliance. The danger of inability to uphold serious discipline for violation of the SOE is that employees might minimize their obligations to report to work during a *bona fide* operational emergency. Such failures would threaten the Company's ability to service its customers, including providing on-time performance. Such absences would place additional burdens on employees who do meet their reporting obligations. All this is made worse by Covid restrictions and labor market shortages.

The grievance is sustained and just cause is rejected based on the rules of Grievant's health care provider, her inability to obtain a timely or in-person doctors appointment using Kaiser's system and the unreasonableness of using an urgent care facility or emergency room during Covid. It establishes no general rule. Other circumstances might yield a different result.

A W A R D

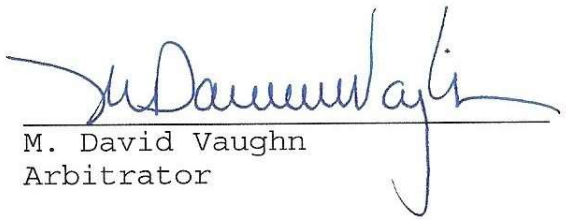
The grievance is sustained. The Company failed to prove just cause to discipline Grievant and, perforce, fell short of proving just cause to terminate her. Its determination to do so was arbitrary, excessive and unreasonable under the specific circumstances presented.

Grievant's termination shall be rescinded and she shall be reinstated to employment in such status as her seniority and qualifications allow. Grievant shall be made whole for wages and benefits lost as a result of her termination. Her records shall be amended to so reflect.

I will retain jurisdiction for a period of 60 calendar days to resolve disputes as to implementation of the Award.

Because the grievance is sustained, my fees and charges are allocated to the Company, pursuant to Article 20, Section One C.

Issued this 11th day of March, 2022, at Clarksville, Maryland.



M. David Vaughn
Arbitrator